REPORTED

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.283 OF 1995

IN

SUIT NO.4000 OF 1990

Syndicate Bank, a Banking Company constituted and functioning under the provisions of Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having its head office at Manipal, South Kanara District and also having its International Division at Maker Towers 'E', 2nd floor, Cuffe Parade, Colaba, Bombay - 400 005.	)	..Appellant (Orig. Defendant)

V/s.

The East India Hotels Ltd., a Company registered under the Companies Act, having its office at 4, Mangoe Lane, Calcutta and Administrative office at Hotel Oberoi Towers, Nariman Point, Bombay - 400 021.	)	..Respondent/ (Orig. Plaintiff.)

Dr.Virendra Tulzapurkar, senior Advocate with Harvinder Toor i/b. Crawfard Bayley & Co. for appellant.

Mr.S.H.Doctor, senior Advocate with A.S.Doctor and S.C. Shah and Mrs. Chhaya Shah Gupta i/b. Bhasin & Co. for respondent.

CORAM : R.M.LODHA AND J.P.DEVADHAR, JJ.

DATED : 12TH OCTOBER, 2004.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. This appeal arises out of the Judgment and order dated 24/2/1995 wherein the preliminary issue of jurisdiction raised by the appellant-defendant has been rejected by the learned Single Judge by holding that section 41 of the Presidency Small Cause Courts Act, 1882 is not applicable to the Suit No.4000 of 1990 filed by the respondent - plaintiff against the appellant - defendant and that the suit is maintainable in this Court.

2. For the sake of convenience the appellant is hereinafter referred to as ‘the defendant’ and the respondent is hereinafter referred to as ‘the plaintiff’.

3. The facts set out in the suit No.4000 of 1990 are that by an indenture of lease dated 12th August, 1971 the plaintiff took on lease from the Government of Maharashtra a plot of land situated at Nariman Point, Mumbai- 400 021 for a period of 99 years on terms and conditions as more particularly set out therein. On the said plot of land, the plaintiff was to construct a 5-star Deluxe Hotel called "The Oberoi Towers" (hereinafter referred to as ‘the hotel’). To

facilitate construction of the hotel, an agreement was arrived at between the parties hereto on 27-12-1974 wherein the defendant agreed to advance a loan of Rs.30 lakhs to the plaintiff with interest @ 12.5% per annum. As per the said agreement dated 27-12-1974 the plaintiff was to permit the defendant to use and occupy 15,000 sq. ft. on the mezzanine to the ground floor of the hotel (hereinafter referred to as 'the said area') for a period of 12 years commencing from 27-12-1974. The said agreement contained a clause that at the end of the period of 12 years the plaintiff shall, on an application made by the defendant in writing, renew the licence for another period of 12 years if the plaintiff so deems fit on the terms and conditions to be mutually agreed upon. Accordingly, the loan of Rs.30 lakhs was advanced by the defendant to the plaintiff and the defendant was put in possession of the said area. It is not in dispute that the said loan amount of Rs.30 lakhs has been repaid by the plaintiff to the defendant with interest within the period stipulated under the aforesaid agreement.

4. It is stated in the plaint that just before the expiry of 12 years, the plaintiff by a letter dated 18/19th April, 1986 called upon the defendant to vacate the said area on the expiry of 12 years as the

plaintiff intended to have the said area for its own purpose. The defendant, however by a letter dated 8-7-1986 sought renewal of the licence for a further period of 12 years as provided under the agreement dated 27-12-1974, but the same was rejected by the plaintiff. Thereafter, several meetings were held between the parties and during the course of one such meeting the representatives of the defendant pleaded for permission to use atleast 1/3rd of the said area, but the same was also rejected by the plaintiff. It is stated in the plaint that the defendant represented from time to time that arrangements are being made to move out of the said area to the defendant's own premises at Maker Towers, Nariman Point, Mumbai. However, by its letter dated 22-7-1989 the defendant informed the plaintiff that the Board of Directors of the defendant have decided not to vacate the said area. It is the case of the plaintiff that ultimately when the fire broke out on the first floor of the Oberoi Hotel on 12-4-1990, the defendant vacated the said area. Lateron by a letter dated 26-5-1990 the defendant claimed back the possession of the said area but the plaintiff contended that the defendant having ceased to occupy the said area was not entitled to claim back possession of the said area from the plaintiff.

5. The defendant thereafter filed a suit bearing No.2735 of 1990 in this Court against the plaintiff under section 6 of the Specific Relief Act, 1963 alleging forcible dispossession and sought restoration of possession of the said area. In the said suit both the parties agreed that only for the purposes of the said suit, the parties will proceed on the footing that the defendant herein has been forcibly dispossessed. Thereupon, by a Judgment and order dated 6-11-1990 the said suit was decreed by this Court and the plaintiff was directed to hand back possession of the said area to the defendant. The Court, however, stayed implementation of the said decree for 10 weeks to enable the plaintiff to obtain such orders as may be advised to protect its interest.

6. Accordingly, the above suit bearing No.4000 of 1990 was filed by the plaintiff against the defendant in this Court seeking the following reliefs:-

a) That this Hon'ble Court be pleased to declare that the defendants have no right whatever in the said area more particularly described in Exhibit 'A' to the plaint in the Hotel Oberoi Towers and shown in red coloured line on the plan Exhibit 'B' to the plaint and that the plaintiffs are exclusively entitled to the same;

b) that this Hon'ble Court be pleased to declare that the decree dated 6.11.90 in High Court OOCJ Suit No.2735 of '90 is in -operative and incapable of execution except in so far as it directs the Plaintiffs herein to hand over to the defendants equipments, records, books of accounts, furniture, articles and other moveable property belonging to the bank;

c) for an order of permanent injunction restraining the defendants by themselves, their officers, agents and servants from enforcing and / or executing the decree dated 6.11.'90 passed in the High Court OOCJ Suit No.2735 of 1990 except in so far as it directs the Plaintiffs herein to hand over to the bank equipment, records, books of accounts, furniture, articles and other moveable properties belonging to the bank;

d) that pending the hearing and final disposal of the suit the defendants by themselves, their officers, servants and agents be restrained by an order and injunction enforcing or executing or taking any steps in furtherance or in pursuance of the said decree dated 6.11.90 in High Court OOCJ Suit No.2735 of 1990 except in so far as it directs the Plaintiffs herein to hand over to the bank equipments, records, books of accounts, furniture, articles and other moveable property belonging to the bank;

e) For Ad-interim reliefs in terms of Prayer (d) above;

f) for costs of the suit;

g) For such other and further reliefs as the nature and circumstances of the case may require.

7. In the meantime, the plaintiff had filed an appeal against the decree dated 6-11-1990 passed in Suit No.2735 of 1990 but the same was dismissed by a Division Bench of this Court. Against the said

decision the plaintiff filed Special Leave Petition before the Apex Court. While disposing of the said Special Leave Petition, the Apex Court by its order dated 21-9-1994 requested this Court to dispose of Suit No.4000 of 1990 expeditiously and directed that till the disposal of the suit No.4000 of 1990 the decree dated 6-11-1990 passed in Suit No.2735 of 1990 shall not be executed.

8. In the written statement filed in Suit No. 4000 of 1990, the defendant raised the plea of jurisdiction and contented that in view of section 41 of the Presidency Small Cause Courts Act, 1882 this Court has no jurisdiction to entertain and try the suit. Thereupon a preliminary issue was framed as follows:-

> "Whether this Court has no jurisdiction to entertain the suit in view of the provisions of section 41 of the Presidency Small Cause Courts Act, 1882 as contended in para 17 of the Written Statement."

9. After hearing both the parties, the learned Single Judge by the impugned Judgment and order dated 24-2-1995 held that this Court has jurisdiction to entertain and try the suit No.4000 of 1990 and that section 41 of the Presidency Small Cause Courts Act, 1882 is not applicable to the said suit. Being

aggrieved by the said Judgment the present appeal is filed by the defendant.

10. Dr.Tulzapurkar, learned senior advocate appearing on behalf of the appellant-defendant submitted that the suit filed by the plaintiff is in substance a suit between the licensor and the licensee and it relates to recovery of possession of the premises and, therefore, in view of the provisions of section 41 of the Presidency Small Cause Courts Act, 1882, the Small Cause Courts at Bombay alone has jurisdiction to entertain and try the suit.

11. Elaborating his contentions, Dr.Tulzapurkar submitted that in the present case, it is an admitted position that the plaintiff was a licensor and the defendant was a licensee. He submitted that the defendant was put in possession of the said area as licensee by the plaintiff and though the licence had expired on 31st December, 1986, the defendant continued to remain in possession and was entitled to remain in possession till the possession was recovered by due process of law. He submitted that as the plaintiff had dispossessed the defendant without due process of law, the defendant had filed suit No.2735 of 1990 under section 6 of the Specific Relief Act, 1963 and this

Court has decreed the suit and ordered the plaintiff to restore possession of the suit premises to the defendant. The right of the defendant to possession of the premises was recognised by the decree passed by this Court in the suit filed under section 6 of the Specific Relief Act and, therefore, the present suit which in effect seeks to recover legal possession of the suit premises from the defendant can be filed only in the Small Cause Courts and not in this Court.

12. Placing strong reliance on the Division Bench decision of this Court in the case of **Nagin M.Dagli V/s. Haribhai Manilal Patel** reported in **A.I.R. 1980 Bom. 123,** the counsel submitted that it is the substance of the plaint and not the form which is required to be considered. In the present case, the suit in substance relates to recovery of legal possession from the defendant and the relief in the suit is camouflaged in the guise of a suit for declaration and injunction.

13. Relying upon the Full Bench decision of this Court in the case of **D.K.Jagam V/s. J.G.Gore** reported in **A.I.R. 1965 Bom. 177**, the counsel submitted that the words ‘relating to recovery of possession’ appearing in section 41 of the Presidency Small Cause

Courts Act is wide enough to include any suit or proceeding in connection with or having direct bearing on the question of possession of the premises. He submitted that even if the suit is not for possession, if the relief claimed in the suit is in regard to or in respect of recovery of possession or the suit by the plaintiff to get rid of an order of his eviction by an injunction restraining the defendant from interfering with his possession, it will fall within the scope of section 41 of the Presidency Small Cause Courts Act.

14. Mr.Tulzapurkar relied upon the decision of the Apex Court in the case of **M.D.Jain V/s. E.B.Ogale** reported in **A.I.R. 1995 S.C. 1102** and the decision in the case of **Natraj Studios (P) Ltd. V/s. Navrang Studies** reported in **A.I.R. 1981 S.C. 537** and submitted that in the present case though the plaintiff is in physical possession, the plaintiff is trying to get a relief which has the effect of the defendant ceasing to have any right to possession and a relief preventing the defendant from enjoying the legal possession and, therefore, the present suit clearly relates to the defendant's possession as licensee. The fact that the licence has expired makes no difference and as held by this Court in the case of Nagin M. Dagli (supra) the words 'relating to recovery of

possession' in section 41 of the Presidency Small Cause Courts Act would cover suits which affect the rights and obligations of the licensee arising under the existing relationship or under the erstwhile relationship of the licensor and the licensee.

15. The counsel submitted that the word 'possession' used in section 41 cannot be interpreted to mean only the actual or physical possession. It includes not only the physical possession but also the legal possession i.e. the possession which is recognised and protected as such by law. Referring to the meaning of the word 'possession' in the Halsbury Laws of England 4th Edition, Volume 35 (paras 1111, 1112, 1113), Butterworth's "words & phrases legally defined", 2nd edition (pages 151,152, 153) and Salmond on Jurisprudence, 12th Edition (pages 275 & 276), it was submitted that legal possession may exist without defacto possession and physical possession is not always regarded as possession in law. The learned counsel submitted that the Courts have interpreted the word 'possession' to mean physical or legal or constructive, depending on the context in which it is used and the object of the Act itself. In this connection, the counsel relied upon the decisions in the case of **Kailash Rai V/s. Jai Jai Ram [A.I.R. 1973**

S.C. 893], Seksaria Cotton Mills Ltd. V/s. The State of Bombay [A.I.R. 1953 S.C. 278], Gurucharan Singh V/s. Kamla [A.I.R. 1977 S.C. 5], Superintendent & Rembracer of Legal Affairs V/s. Anil Keman [(1979)4 S.C.C. 274], Ramesh Bejoy Sharma V/s. P.Rai [(1979) 4 S.C.C.27], Madan Lal V/s. State of Himachal Pradesh [(2003) 7 S.C.C. 465] and Megh Singh V/s. State of Punjab [(2003) 8 S.C.C. 666].

16. The counsel submitted that in the present case, by virtue of the decree dated 6-11-1990, the defendant's right to actual possession is recognised and the defendant is in legal possession. Thus, the plaintiff is in immediate possession and the defendant is in mediate possession of the suit premises. Although Salmond on Jurisprudence enunciates three categories of mediate possession, the counsel submitted that by virtue of section 6 of the Specific Relief Act, 1963, a fourth category of mediate possession is recognised and that category includes the case of a successful plaintiff in a suit under section 6 who has obtained a decree but has as yet not obtained physical possession. In the present case, the plaintiff without first restoring possession wrongfully obtained, is trying to extinguish through the Court of law the

mediate possession of the defendant and thereby is seeking legal possession. Such a suit which in effect relates to recovery of legal possession or mediate possession is triable only by the Small Cause Courts at Bombay.

17. It was submitted that in the present case the effort of the plaintiff is to be put in legal possession by depriving the defendant from the having legal possession and, therefore, the suit is directly covered by section 41 of the Presidency Small Cause Courts Act. In this connection, the learned counsel relief upon the decisions in the case of **R.Pandit V/s. Jagtapsingh [A.I.R. 1964 Bom.85], Ranjit Chanbe V/s. Behram [64 Bom.L.R. 464], D.K.Jangam V/s. G.J.Gore [A.I.R. 1965 Bom.177], R.J.Mehta V/s. G.R.Nadkarni [(1989) Mah.L.J. 809], M.D.Jain V/s. V.Prakash [A.I.R. 1995 S.C. 1102], Babulal V/s. Nandram [A.I.R. 1958 S.C. 677] and Ramesh Mehra V/s. I.D.Mehre [(2001) 3 All MR 668]**.

18. With reference to the declaration sought in terms of prayer clause (a) of the plaint, it was submitted by the learned counsel for the defendant that firstly, such a declaration can be sought under section 34 of the Specific Relief Act, 1963 only if the

position is denied and not otherwise and secondly, the declaration of title must be dehors the Act. In this connection, the learned counsel relied upon the decisions in the case of **R.P.Chanbe V/s. Behram [64 Bom.L.R. 464] and D.K.Jangam V/s. J.G.Gore [A.I.R. 1965 Bom. 177]**.

19. With reference to the relief of injunction in prayer clause (b) of the suit, it was submitted that in substance this is relief seeking recovery of legal possession and even such a relief is covered by section 41 of the Presidency Small Cause Courts Act as per the decision of this Court in the case of Nagin M.Dagli (supra at para 9 & 10).

20. The counsel for the defendant submitted that in a suit under section 6(1) of the Specific Relief Act, 1963, the question of title either of the plaintiff or of the defendant is irrelevant. The only question that is relevant is whether the plaintiff filing suit under section 6(1) has been dispossessed without due process of law. Such a suit is entertainable by a Civil Court and not by the Designated Court under the Bombay Rent Act or under section 41 of the Presidency Small Cause Court Act. Assuming that such a suit is by a tenant or by a

licensee against a licensor, such a suit is to be tried by a Civil Court as held in A.I.R. 1950 Bom.343 and A.I.R. 1984 Bom.290.

21. The counsel further submitted that it is not open to the plaintiff in the present suit to dispute the finding given by the Court in the earlier suit under section 6 by contending that the concession made by the plaintiff in the earlier suit under section 6(1) that the plaintiff in that suit was dispossessed without due process of law was a concession made only for the purpose of that suit. Whether a concession was made or not, the Court in that suit could never have passed a decree of restoration of possession unless the Court came to the conclusion that the plaintiff in that suit was dispossessed without due process of law. A finding given on concession or on merits is res judicata in the subsequent suit as regards that finding is concerned. The finding in the earlier suit regarding possession of the plaintiff in that suit is binding on the plaintiff in the present suit and he cannot reagitate the same issue by contending that the said finding was on a concession which was made only for the purpose of that suit. It is not the concession which makes the finding res judicata but the finding does. It is, therefore, not permissible for the

plaintiff in the present suit to contend that the admission was qualified meaning thereby the concession was only for the purpose of that suit. Implicit in the decree under section 6(1) in the earlier suit is the finding that the plaintiff in that suit who is the defendant in the present suit was dispossessed without due process of law. It was a jurisdictional issue in the earlier suit which was required to be decided before passing a decree for restoration of possession. It is immaterial whether that issue was answered on the basis of concession made or on any qualified admission or on evidence. Once a decree has been passed under section 6(1), in a subsequent suit for possession on the basis of title, the issue as to the dispossession without due process of law cannot be reagitated. The issue as to possession of the plaintiff in the earlier suit under section 6(1) becomes res judicata in the present suit filed by the plaintiff for possession on the basis of title. He submitted that it is not the second suit that is barred by the principles of res judicata but what is barred is the issue relating to possession. In this connection, the counsel relied upon the decisions reported in A.I.R. 1928 Calcutta 758 and A.I.R. 1933 Calcutta 923.

22. The learned counsel for the defendant

further submitted that the contention of the plaintiff that in the present case the preliminary issue is to be answered on the basis of averments in the plaint and that the concession made in the earlier suit was a limited concession, are totally untenable. The nature of the concession whether absolute or qualified is irrelevant once an issue has been answered regarding dispossession in the earlier suit. It is the answer to that issue that makes the present contention that the defendant in the present suit had handed over possession back to the plaintiff in the present suit and they were not dispossessed without due process of law becomes, barred by the principles of res judicata or estoppel. It is not the concession that is relevant but it is the decree which is relevant. It was submitted that if the plaintiff in the present suit is allowed to raise the concluded issue once again, it will amount to making a mockery of the Judgment and decree passed in the earlier suit under section 6(1) of the Specific Relief Act, 1963.

23. Alternatively, the learned counsel submitted that if the averments made in the plaint are only to be read then, the said averments should be read in entirety. In the present case, the averments made in the plaint refer to the correspondence in which it is

contended that the plaintiff in the earlier suit was dispossessed without due process of law and that the finding to that effect was given and issue answered in favour of the plaintiff in the earlier suit.

24. The counsel submitted that the present suit is to defeat the decree passed in the earlier suit. The present suit is a sequel to the earlier suit and arises only because of the earlier suit. The concession made in the earlier suit had resulted in the plaintiff in the earlier suit not proving that in fact he was in possession, that he had never vacated the premises and that he was dispossessed without due process of law. When the decree was passed on that basis, in the present suit which is sequel to that decree, the plaintiff is not entitled to reprobate and contend that the defendant in the present suit was not in possession, or that he was not dispossessed, particularly when the present suit, according to the plaintiff, is filed to defeat the decree passed in the earlier suit.

25. Counsel for the defendant further submitted that it is settled position in law that in India possession must be obtained through a Court of law and a person is not entitled to take law in his own hands.

The object of section 6 is to prevent a person being ousted from possession, except by the process of law. In this connection, the counsel placed reliance on the decision of the Apex Court reported in A.I.R. 1968 S.C. 620.

26. Lastly, counsel for defendant submitted that in effect and substance what the plaintiff is seeking in the present suit is to put an end to the entitlement of the defendant to possession. The plaintiff's claim is on the footing that he is the owner, that he had granted licence and occupation of the defendant is unauthorised. It is not the case of the plaintiff that the defendant is trespasser ab initio. The entitlement of the plaintiff in the present suit to the determination of the defendant's right to possession is only on the basis that the defendant does not have any right to claim back possession. The mediate possession of the defendant is sought to put an end to in the present suit. The present suit certainly concerns the question of possession of the defendant whose possession was not illegal ab initio but on the ground that the possession as on the date of the present suit has become unauthorised. The present suit squarely falls in the nature of suit contemplated under section 41 of the Presidency Town Small Cause Courts Act. In

the light of the decision of this Court reported in A.I.R. 1980 S.C. 123 and in view of the decision of the Supreme Court reported in A.I.R. 1995 S.C. 1102, the learned counsel submitted that the present suit is a suit concerning recovery of possession of the defendant as ex-licensee by the plaintiff as the owner/licensor and, therefore, the suit can be tried only by the Small Causes Court at Bombay and not by this Court.

27. Mr.Doctor, learned senior advocate appearing for the plaintiff, on the other hand, supported the order passed by the learned Single Judge. He submitted that the jurisdiction of the Court to entertain the suit is to be determined on the basis of the averments in the plaint. In the present case, the counsel submitted that although as a matter of historical background the past relationship of licensor and licensee between the plaintiff and the defendant was mentioned in the suit, the foundation of the suit was based on the fact the defendant had vacated the suit area and that the plaintiff continues to be in actual physical possession of the suit premises as a owner thereof. He submitted that in view of the defendant obtaining a decree from this Court in the earlier suit on the basis of the limited concession made by the

plaintiff, it became necessary for the plaintiff to file a substantive suit in this Court and seek a declaration that the plaintiff is entitled to retain possession based on title and that the defendant has no right whatsover in the said area. As a consequential relief the plaintiff has sought a declaration that the decree dated 6-11-1990 in section 6(1) suit filed by the defendant is inoperative and incapable of execution. He submitted that on the basis of the averments made in the plaint, it was clear that the suit was not a suit relating to recovery of possession and, therefore, section 41 of the Presidency Small Cause Courts Act was not applicable and the same is maintainable in this Court.

28. The counsel for the plaintiff submitted that although there was a relationship of licensor and licensee between the plaintiff and the defendant the suit filed by the defendant against the plaintiff under section 6(1) of the Specific Relief Act was maintainable in this Court because the suit was not founded on the said relationship of licensor and licensee. Similarly, the suit filed by the plaintiff against the defendant under section 6(4) of the Specific Relief Act is also not founded on the relationship of licensor and licensee and, therefore,

it is not open to the defendant to contend that the suit filed under section 6(4) of the Specific Relief Act is not maintainable in this Court.

29. Relying upon the decision of this Court in the case of **Mari Doddatamma Markundi V/s. Santaya Ramkrishna Pai Kolle** reported in **A.I.R. 1922 Bombay 216**, Mr.Doctor submitted that where the plaintiff is entitled possession and at the instance of the defendant a decree under section 6 of the Specific Relief Act is passed against the plaintiff, then the plaintiff is entitled to bring a suit to establish his title to the property and for injunction restraining the defendant from executing the decree obtained against the plaintiff.

30. The learned counsel for the plaintiff submitted that the object of the title suit under section 6(4) of the Specific Relief Act in substance is to have a summary order for possession passed under 6(1) of the Specific Relief Act set aside on the basis of title and the right to retain the possession which is with the plaintiff. He submitted that the concession made in the earlier suit was a limited concession and in the present suit it is open to the plaintiff to contend that on the basis of title the

plaintiff is entitled to retain possession.

31. Mr.Doctor submitted that section 6 of the Specific Relief Act is a Code by itself and, therefore, suit filed under section 6(4) has to be filed in the Civil Court only. He submitted that the phrase "to recover possession thereof" in section 6(4) of the Specific Relief Act does not preclude or bar a suit seeking right to retain possession on the basis of the title. He submitted that in the present suit, the plaintiff was in actual physical possession of the suit premises and being dissatisfied with the decree passed under section 6 of the Specific Relief Act, it was open to the plaintiff to institute a suit for declaration of his title and retention of the possession by restraining the defendant from dispossessing him on the basis of the decree passed under section 6(1) of the Specific Relief Act. In this connection, he relied upon the decision of the Allahabad High Court in the case of **Chunni and another V/s. Sullahar and another** reported in **A.I.R. 1972 Allahabad 418** and the decision of the Gujarat High Court in the case of **Mohammad Hussain Suleman Shaikh and another V/s. Batukbhai Valjibhai and others A.I.R. 1984 Gujarat 66**.

32. The learned counsel for the plaintiff

submitted that the decision of this Court in the case of A.I.R. 1980 Bom.123 is not applicable to the facts of the present case and is distinguishable on facts. He submitted that in that case even after the expiry of the licence the licensee was in possession of the licenced premises. On a suit being filed by the licensor seeking a declaration that the licensee in that suit was a trespasser, this Court held that whether the licensee had become a trespasser would depend upon the determination of the issue as to whether the licence had come to an end or not and, therefore, the suit in substance relates to the recovery of possession from the licensee and, therefore, would fall within the scope of ambit of section 41 of the Presidency Small Cause Courts Act. In the present case, the averments made in the plaint are that the defendant had voluntarily handed over possession of the suit premises and on the date of filing of the suit, the plaintiff who is the owner of the premises was in actual physical possession of the suit premises and, therefore, the suit was based on title to retain possession. Accordingly, learned counsel submitted that the ratio laid down by this Court in the case reported in A.I.R. 1980 Bom. 123 is not applicable to the facts of the present case.

33. The learned counsel for the plaintiff submitted that the decision of the Apex Court reported in A.I.R.1995 S.C.1102 is also distinguishable on facts. He submitted that in that case the licensee in possession had filed the suit seeking simpliciter injunction restraining the licensor from dispossessing the licensee. In view of the averments made in that suit to the effect that the licensee was put in possession under an irrevocable licence/tenancy agreement, it was held that such a suit would be covered within the meaning of the words 'relating to recovery of possession' as employed in section 41(1) of the Presidency Small Cause Courts Act. In the present case, it was submitted that the facts are altogether different. He submitted that the averments made in the present suit are that the defendant has voluntarily handed over the said area and that the plaintiff is in possession in his own right. Accordingly, it was submitted that the above decision of the Apex Court is also distinguishable on facts.

34. The learned counsel for the plaintiff further submitted that the declaratory relief claimed in the present suit could not be granted by the Small Cause Courts in view of the bar contained in section 19 of the Presidency Small Cause Courts Act and it is only

this Court which can grant the reliefs claimed in the suit. He submitted that the concession made by the plaintiff in the earlier suit to the effect that the defendant was forcibly dispossessed was only limited to that suit and that concession does not bar or come in the way of the plaintiff in claiming reliefs in the present suit based on title. The counsel submitted that neither the defendant had raised the plea of res judicata nor the decision of the learned Single Judge is based on the issue of res judicata and, therefore, it is not open to the defendant to raise the plea for the first time in the appeal. He submitted that while considering the issue of jurisdiction as a preliminary issue, the Court cannot go beyond the statements contained in the plaint. He submitted in order to succeed on the jurisdictional aspect, the defendant must show that even if the statements contained in the plaint are held to be correct, the Court has no jurisdiction as a matter of law. In this connection, the learned counsel for the plaintiff relied upon the decision of the Apex Court in the case of **Exphar Sa and another V/s. Eupharma Laboratories Ltd. and another** reported in **(2004) 3 Supreme Court Cases 688**.

35. In rejoinder, Dr.Tulzapurkar, learned

counsel for the defendant submitted that the decisions relied upon by the plaintiff in the present suit in A.I.R. 1922 Bom.216, (1967) 1 Mad.LT 346, A.I.R. 1980 Guj.66 and A.I.R. 1972 All 418 are of no relevance for the purpose of the present appeal. He submitted that assuming that the reliefs claimed in the present suit are proper, in fact and substance the suit is relating to or concerning possession of the defendant as ex-licensee by the plaintiff as the licensor. He submitted that assuming that the plaintiff in the present suit is in actual possession and is entitled to ask for only injunction restraining the defendant in the present suit from executing the decree for restoration of possession under section 6(1) of the Specific Relief Act 1963, such a relief relates to possession as held by the Supreme Court in A.I.R. 1995 S.C. 1102 and is maintainable only in the Small Cause Courts.

36. Alternatively, Mr.Tulzapurkar submitted that the aforesaid decisions relied upon by the plaintiff cannot be relied upon for the purpose of showing that the Civil Court has jurisdiction to entertain a suit which is filed under section 6(4) of the Specific Relief Act when such a suit is between a licensor and licensee and concerns itself with possession of the

licensee. The nature of the relief whether it is in the nature of decree for possession on the basis of title or an injunction to prevent execution of a decree for restoration of possession is a suit concerning possession of the defendant who was not trespasser ab initio but in valid and lawful occupation as licensee. The fact that the licence has come to an end does not make the defendant a trespasser ab initio and in view of the decision in A.I.R. 1980 Bom.123 the present suit is a suit relating to possession.

37. Alternatively, Mr.Tulzapurkar submitted that the decision in A.I.R.1922 Bom.226 is distinguishable on facts. The learned Single Judge in that case had relied on the observations in the Calcutta case in which delay was held to be the reason for granting injunction against the execution of decree of possession under section 6 of the Specific Relief Act. The counsel submitted that in view of the decision of the Supreme Court reported in A.I.R. 1968 S.C.620 the decision reported in A.I.R.1922 Bom.226 cannot be considered to be a good law.

38. Mr.Tulzapurkar submitted that the contention of the plaintiff that the suit for a declaration and injunction cannot be entertained by the Small Causes

Court in view of the provisions of section 19 of the Presidency of Small Cause Courts Act is also untenable. He submitted that as per section 19 the Small Causes Court shall not have jurisdiction to entertain a suit for declaratory decrees or suit on any Judgment of a High Court. He submitted that the said bar does not apply in view of section 41 which contains a non obstante clause "notwithstanding anything contained elsewhere in this Court". He submitted that once it is found that the suit is between a licensor and a licensee and it relates to possession, such a suit can be filed only in the Small Causes Court irrespective of the nature of reliefs claimed in a suit. The fact that the plaintiff has asked for declaration of its title or for injunction restraining execution of restoration of possession will not bring the suit outside the purview of section 41 on the ground that such suit cannot be filed in the Small Causes Court in view of clauses (i) or (s) or (v) of section 19 of the Presidency Small Cause Courts Act.

39. He submitted that the contention section 6 is a Code by itself and therefore, the suit has to be filed in a Civil Court is not sustainable. Section 6(4) does not talk of the Court in which such a suit is to be filed. Referring to section 9 of the Code of

Civil Procedure, Mr.Tulzapurkar submitted that suit under section 6(4) is like any other suit and if such a suit is between the licensor and licensee concerning possession then, the Civil Court is not entitled to entertain such a suit in view of section 41 of the Presidency Small Cause Courts Act. He submitted that section 6(4) of the Specific Relief Act does not provide for institution of a suit in a Civil Court. All that it says is that a suit under section 6(1), which is based purely on possession, cannot bar a person from filing a suit to establish his title and to recover possession thereof. Section 6(4) does not confer a separate or independent right to file a suit on the basis of title for recovery of possession of immovable property. Such a right exists independent of section 6(4). He submitted that section 6(4) does not create any right and it only clarifies the position in law that special remedy provided under section 6(1) will not come in the way of a person following his normal remedy according to the procedure laid down by the Code of Civil Procedure. In this connection, he relied on the decision of the Apex Court reported in A.I.R.1968 S.C.1165. Accordingly, the counsel submitted that the decision of the learned Single Judge be set aside and the appeal be allowed.

40. We have heard the counsel on both sides at length. The only issue required to be considered in this appeal is whether the suit filed by the plaintiff under section 6(4) of the Specific Relief Act is maintainable in this Court or whether in view of section 41 of the Presidency Small Cause Courts Act the said suit is maintainable only in the Small Causes Court at Bombay. The said provisions read as under :-

SECTION 6 OF THE SPECIFIC RELIEF ACT, 1963

> "6. Suit by person dispossessed of immovable property :- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.
>
> (2) No suit under this section shall be brought-
>
> (a) after the expiry of six months from the date of dispossession; or
>
> (b) against the Government.
>
> (3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
>
> (4) Nothing in this section shall bar any person from suit to establish his title to such property and to recover possession thereof."

SECTION 41 OF THE PRESIDENCY SMALL CAUSE COURTS ACT, 1882.

> "S.41. Suits or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and licence fees or rent, except to those to which other Acts apply to lie in Small Causes Court - (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, but subject to the provisions of sub-section (2), the Court of Small Cause shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of any licence fee or charges or rent therefor, irrespective of the value of the subject-matter of such suits or proceedings.
>
> (2) Nothing contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges of rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act, the Bombay Housing Board Act, 1948 or any other law for the time being in force applies.

41. The object of section 6 of the Specific Relief Act is to discourage people from taking law into their own hands howsoever good their title may be. Although the Civil Courts are empowered to decide the disputed rights of the parties as per the procedure

prescribed under the Code of Civil Procedure 1908, section 6 of the Specific Relief Act provides for recovery of possession in a summary manner. Under section 6(1) of the Specific Relief Act, without establishing title, a person can file a suit and obtain a decree for possession by establishing that he was in possession of the immovable property within six months prior to the filing of the suit and that he has been dispossessed otherwise than in due course of law.

42. Section 6(4) of the Specific Relief Act provides that passing of a decree under section 6(1) shall not bar a person to file a suit to establish his right to the property and possession thereof as a consequential relief. In other words, despite the decree passed under section 6(1), either party to the section 6(1) suit can file an independent suit to establish their legal right to the said property and possession thereof as a consequential relief. If the person who has suffered a decree under section 6(1) establishes his legal right to the property in section 6(4) suit, then, he will be entitled to possession and the decree passed under section 6(1) will become ineffective or unexecutable. Thus, section 6 of the Specific Relief Act, while discouraging people from taking law in their own hands, ensures that ultimately

it is the person who has legal right to the property enjoys the possession.

43. In the present case after the defendant has obtained a decree in a suit filed under section 6(1), the plaintiff has filed a suit under section 6(4) of the Specific Relief Act seeking a declaration that the defendant has no right to the said area and that the plaintiff has exclusive right over it and consequently sought a declaration that the decree passed under section 6(1) in so far as it directs the plaintiff to hand over possession to the defendant is inoperative and incapable of execution. Such a suit, according to the defendant, is maintainable only in the Small Causes Court at Bombay. Rejecting the above contention of the defendant, the learned Single Judge has held that such a suit is maintainable in this Court.

44. The jurisdiction of the Court to entertain a suit is to be determined on the basis of the averments made in the plaint. As noticed above, in the present case the principle relief claimed in the suit is that having handed over possession the defendant has no right to the said area and the plaintiff in possession of the said area as a true owner is exclusively entitled to it. As a consequential relief, the

plaintiff has sought a declaration that the decree passed under section 6(1) in so far as it directs the plaintiff to hand over possession of the said area to the defendant is inoperative and incapable of execution. As a historical background the plaintiff has narrated that initially there was a relationship of licensor and licensee between the plaintiff and the defendant and that on expiry of the licence there were disputes between the parties, but, ultimately the defendant has handed over possession of the said area to the plaintiff. The reliefs claimed in the suit are not based on these facts but are based on the fact that the defendant has handed over possession and the plaintiff in possession is entitled to a declaration that the defendant has no right whatsoever to the said area and the plaintiff as a true owner is exclusively entitled to it.

45. However, it is the contention of the defendant that section 41 of the Presidency Small Cause Courts Act, 1882 bars jurisdiction of Civil Courts to entertain such a suit and only the Court of Small Causes has jurisdiction to entertain such a suit. Section 41 of the Presidency Small Cause Courts Act inter alia confers exclusive jurisdiction to the Court of Small Causes to try all suits and proceedings

between a licensor and licensee or a landlord and tenant relating to recovery of possession of any immovable property situated in Greater Bombay. In the present case, the suit is neither based on the relationship of licensor and licensee, nor it relates to recovery of possession of immovable property based on such relationship, past or present. The suit in substance is to establish that upon the defendant handing over possession, the plaintiff is entitled to continue in possession as a true owner; that the decree under section 6(1) be declared to be inoperative and not executable and that the defendant is not entitled to restoration of possession. The suit does not relate to recovery of possession based on relationship of licensor and licensee at all as contemplated under section 41 of the Presidency Small Cause Courts Act. The case of the defendant is that there was a relationship of licensor and licensee between the plaintiff and the defendant and in view of the decree for possession passed in favour of the defendant in section 6(1) suit, the present suit filed under section 6(4) in substance relates to recovery of possession and, therefore, as per section 41 of the Presidency Small Cause Courts Act, such a suit is maintainable only in the Court of Small Causes at Bombay does not merit acceptance. As stated earlier,

reference to the past relationship of licensor and licensee between the plaintiff and the defendant in the plaint is only as a historical background and not with a view to get any relief in the suit on that basis. It is not the case of the plaintiff that on expiry of licence the right of the defendant got extinguished and, therefore, the plaintiff as true owner is entitled to the premises. The specific case of the plaintiff is that upon handing over possession the defendant has no right to the said area and the plaintiff who is in actual physical possession is exclusively entitled to the said area as a true owner and, therefore, the decree passed under section 6(1) of the Specific Relief Act be held to be inoperative and not executable. Such a suit, in our opinion, is maintainable and cannot be said to be a suit 'relating to recovery of possession' within the meaning of section 41 of the Presidency Small Cause Courts Act.

46. It was contended that the right of the defendant to have possession of the premises was recognised by the decree passed by this Court in the suit filed under section 6 of the Specific Relief Act and, therefore, the present suit which in effect seeks to recover legal possession of the suit premises from the defendant can be filed only in the Court of Small

Causes. There is no merit in this contention. As stated earlier, in section 6(1) suit the decree is passed in a summary manner without going into the legal rights of the parties and as a matter of fact that was not gone into. That the decree passed in summary manner under section 6(1) can be defeated by establishing the legal right of possession based on title over the said property by filing the suit under section 6(4) seems to be the settled legal position. If any decision is needed on this point, we may refer to the decision of this Court in the case of M. D. Markundi (supra). Therefore, the entitlement of the defendant under the decree passed in section 6(1) does not necessarily mean that the defendant has legal right to the property. On the other hand the plaintiff being owner in possession of the property and entitled to remain in possession can maintain the suit under section 6(4) of the Specific Relief Act and seek declaration of his title and injunction for restraining the defendant from executing his decree. Such suit obviously is not covered by section 41 of the Presidency Small Cause Courts Act triable by the Small Causes Court. Rather that suit is maintainable in this Court.

47. Strong reliance was placed by the learned

counsel for the defendant on the Division Bench decision of this Court in the case of Nagin M.Dalgi (supra) and especially para 9 & 10 of the said Judgment which reads thus :-

> "9. Mr.Sanghavi next argued that the relief claimed by him in the suit was not a decree for possession but was a declaration that the defendant was a trespasser upon or in respect of the said flat and that he had no right, title or interest to remain or continue to remain in use and occupation or possession thereof, and for a mandatory injunction against the defendant forthwith to remove himself, his servants and agents, together with his belongings, from the said flat and to hand over vacant and peaceful possession of the said flat to the plaintiff. In Mr.Sanghavi's submission this was thus a suit for declaration and an injunction and by reason of cls. (i) and (s) of S.19 of the Presidency Small Cause Courts Act, 1882, the Small Cause Court had no jurisdiction to entertain such a suit or to grant such reliefs. The material provisions of the said S.19 are as follows:
>
> > "19. Suits in which Court has no jurisdiction.
> >
> > The Small Cause Court shall have no jurisdiction in -
> >
> > x x x x
> >
> > (i) Suits to obtain an injunction;
> >
> > x x x x
> >
> > (s) Suits for declaratory decrees; "
>
> The first question which arises is whether this is really in substance a suit for a declaratory decree or an injunction, or a suit for recovery of possession of immovable property camouflaged in the guise of a suit for a declaration and injunction. The words which cl.(s) of S.19 uses are "suits for declaratory decrees." Suits for declaratory

decrees are governed by Chap.VI of the Specific Relief Act, 1963. When declarations can be granted is provided for by S.34 of that Act, which occurs in that Chapter. Under the said S.34 of that Act, which occurs in that Chapter. Under the said S.34 "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right." Now, here at no stage has the defendant denied or been interested in denying the plaintiff's title to the said flat. On the contrary, his case as set out in his said affidavit in reply and in the correspondence proceedings the suit is that while the second agreement of licence was still subsisting, it was orally agreed between the parties that the licence would continue as long as the defendant desired. He is thus accepting the title of the plaintiff to the said flat as also the plaintiff's right to give the licence in respect thereof to him in the plaintiff's legal character as licensor. The plaintiff has contended in the plaint that on the licence coming to an end the defendant is a trespasser upon the said premises. Whether the defendant has become a trespasser or not is an issue which has to be tried in the suit. What the plaintiff really wants by the declaration prayed for in prayer (a) of the plaint is a declaratory decree with respect to the answer in his favour to that issue. Such a declaration would stand on the same footing were a plaintiff in a suit for damages for breach of contract to ask for declaration to the effect that the defendant has committed a breach of contract. It is the determination of the issue whether the licence has come to an end or not which would give the right to the plaintiff to obtain the relief of possession. The declaration sought for does not change the real nature of the suit. Section 34 of the Specific Relief Act has no application to the case, and this suit cannot be described as a suit for a declaratory decree.

10. Prayer (b) of the plaint, in the guise of a prayer for a mandatory injunction against the defendant to remove himself from the said flat, is in substance no other than a

> prayer for the recovery of possession of the said flat. Realizing full well that the proper relief to pray for would be a decree or order for possession but at the same time being desirous of bringing the suit in this Court and simultaneously not wishing the suit to suffer from a technical defect, the draftsman of the plaint has in the said prayer sought to protect the plaintiff by using the phraseology "that the defendant be ordered and decreed by a mandatory order or injunction..." Thus, really, what is prayed for is a decree for possession. "It is now well settled that when we have to determine the nature of the suit what we are to look at is the real substance of the suit and not legal ingenuity in drafting the plaint. The plaint read as a whole and the real substance of the suit leave no doubt that this is a suit between persons who hold the character of a licensor and licensee, which relationship having come to an end according to the plaintiff, the plaintiff has become entitled both in law and under the agreement of licence to recover possession of the property from the defendant, his licensee."

In our opinion, the ratio laid down in the aforesaid decision is not applicable to the facts of the present case. In that case, the licensee had continued in possession of the property even after the licence had expired. In a suit filed by the licensor for possession, it was held that it is the determination of the issue whether the licence has come to an end or not which would give the right to the plaintiff to obtain the relief of possession. In the present case, the specific plea raised in the plaint is that the defendant has handed over possession of the property to the plaintiff and that on the date of the filing of the

suit the plaintiff is in actual physical possession as true owner. Thus, the facts in the present case are altogether different and on the basis of the averments made in the plaint the issue as to whether the defendant was a licensee and whether the licence has come to an end or not does not arise in the present case at all. Therefore, the ratio laid down in the aforesaid case has no relevance in the present case.

48. The counsel for the defendant had also placed strong reliance on the decision of the Apex Court in the case of M.D. Jain (supra). Para 13 of the said Judgment reads thus :-

> "13. So far as the first condition is concerned, a comprehensive reading of the relevant averments in the plaints in both these cases leaves no room for doubt that the plaintiffs claim relief on the basis that they are licensees on monetary consideration and the defendants are the licensors. The first condition is clearly satisfied. Then remains the question whether the third condition, namely, that the suits must relate to the recovery of possession of immovable property situated in Greater Bombay is satisfied or not. It is not in dispute that the suit properties are immovable properties situated in Greater Bombay but the controversy is around the question whether these suits relate to recovery of possession of such immovable properties. The appellants contended that these are suits for injunction simpliciter for protecting their possession from the illegal threatened acts of respondents - defendants. Relying on a series of decisions of this Court and the Bombay High Court, Guttal, J.Pendse,J. and Daud, J. had taken the view that such

injunction suits can be suit can be said to be relating to the possession of the immovable property. Sawant,J. has taken a contrary view. We shall deal with these relevant decisions at a later stage of this judgment. However, on the clear language of the section in our view it cannot be said that these suits are not relating to the possession of the immovable property. It is pertinent to note that Section 41(1) does not employ words "suits and proceedings for recovery of possession of immovable property." There is a good deal of difference between the words "relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immovable property." The words "relating to" are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally recover possession from the plaintiff-licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by Section 41(1). In this connection, we may refer to Blacks' Law Dictionary, Super Deluxe 5th Edition. At page 1158 of the said Dictionary, the term "relate" is defined as under :

> "to stand in some relation, to have bearing or concern, to pertain, refer, to bring into association with or connection with."

It cannot be seriously disputed that when a plaintiff-licensee seeks permanent injunction against the defendant-licensor restraining the defendant from recovering the possession of the suit property by forcible means from the plaintiff, such a suit does have a bearing on or a concern with the recovery of possession of such property. In the case of Renusagar Power Company Ltd. v. General Electric Company, (1985) 1 SCR 432 :(AIR 1985 SC 1156), a Division Bench of this Court had to consider

the connotation of the term "relating to", Tulzapurkar, J. at page 471 (of SCR) : (at p.1170 of AIR), for the report has culled out propositions emerging from the consideration of the relevant authorities. At page 471 (of SCR): (at p.1170, Para 25 of AIR), proposition No.2 has been mentioned as under:-

> "Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "inconsequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement."

In Doypack Systems Pvt.Ltd. v. Union of India, (1988) 2 SCC 299 :(AIR 1988 SC 782) another Division Bench of this Court consisting of Sabyaschi Mukherji (as he then was) and G.L.Oza, JJ., had an occasion to consider this very question in connection with the provisions of Sections 3 and 4 of the Swadeshi Cotton Mills Co.Ltd. (Acquisition and Transfer of Undertaking) Act, 1986. Sabyaschi Mukherji,J., speaking for the Court, has made at the following pertinent observations in paragraphs 49 and 50 (of SCC): (Paras 48 and 49 of AIR) of the report:

> "The words "arising out of" have been used in the sense that it comprises a purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words "pertaining to" and "in relation to" have the same wide meaning and have been use interchangeably for among other reasons, which may include avoidance of repetition of the same phrases in the same clause or sentence, a method followed in good drafting. The word "pertain" is synonymous with the word "relate" see Corpus Juris Secundum, Volume 17, Page 693. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of

> comprehensiveness which might have both a direct significance as well as indirect significance depending on the context, see State Wakf Board v. Abdul Azeez (AIR 1968 Mad.79), following and approving Nitai Charan Bagchi v. Suresh Chandra Paul, (1962 (66) Cal WN 767); Shyam Lal v. M.Shyamlal, (AIR 1933 All 649) (FB) and 76 Corpus Juris Secundum 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or snynonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction."

It is, therefore, obvious that the phrase ‘relating to recovery of possession’ as found in Section 41(1) of the Small Causes Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee plaintiff would squarely be covered by the wide of sweep of the said phrase. Consequently, in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Causes Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits."

In our opinion, this decision of the Apex Court does not support the case of the defendant. In the case before the Apex Court, the licensee in possession had filed a suit seeking simpliciter injunction restraining the licensor from dispossessing the licensee. In that context it was held that the words 'relating to recovery of possession' in section 41 of the Presidency Small Cause Courts Act are of wide import and can take in its sweep any suit in which the grievance is made that the licensor is threatening to illegally recover possession from the plaintiff - licensee. The ratio laid down therein is not applicable to the facts of the present case, because, firstly in that case the suit was filed by the plaintiff claiming to be a licensee in possession and, therefore, such a suit would be obviously a suit or proceeding between the licensee and licensor covered under section 41 of the Presidency Small Cause Courts Act. Secondly, in that case, the averments made in the plaint were that the licensee - plaintiff was put in possession under an irrevocable licence / tenancy agreements and the licensee is entitled to seek protection of possession. In the back drop of these averments, it was held that the suit to protect such possession would be covered within the meaning of the words 'relating to recovery of possession' in section 41(1) of the Presidency Small

Cause Courts Act. In the present case, neither the relief claimed in the suit is based on the relationship of licensor and licensee nor the suit is relating to recovery of possession from the defendant as contemplated under section 41 of the Presidency Small Cause Courts Act. When we say this, we say not in the way the plaint is framed but the substance of the plaint. In this view of the matter the aforesaid decision of the Apex Court is not applicable to the facts of the present case.

49. Next contention of the learned counsel for the defendant was that even though the plaintiff is in actual physical possession, in law, by virtue of the decree passed in section 6(1) suit the plaintiff is in immediate possession and the defendant is in mediate possession and, therefore, the suit filed to extinguish the mediate possession would be covered within the meaning of the words ‘relating to recovery of possession’ contained in section 41(1) of the Presidency Small Cause Courts Act. There is no merit in this case as well. As stated above, the jurisdiction of the Court to entertain the suit is to be determined on the basis of the averments made in the plaint. In the present case, the principle declaration of title sought in the plaint is based on the averment

that the defendant having handed over possession has no right to the property and the plaintiff as true owner is exclusively entitled to the said property. It is only when the plaintiff establishes on merits that the defendant has no legal right to the property and that the plaintiff is exclusively entitled to the said property as true owner, the question of getting rid of the right of the defendant for possession under the decree passed in section 6(1) suit would arise. Therefore, whether the defendant is in mediate possession or not is wholly irrelevant while determining the jurisdiction of the Court to try the suit. Thus, on the basis of the averments made in the plaint, it cannot be said that the suit falls within the scope and ambit of section 41 of the Presidency Small Cause Courts Act.

50. In our opinion, the finding given in the earlier suit that the defendant was dispossessed

without due process of law was confined to the suit under section 6(1) and has no relevance while deciding the jurisdictional issue. As stated earlier, the jurisdictional issue is to be determined on the basis of the averment made in the plaint. In the present case, the finding given in the earlier suit filed under

section 6(1) of the Specific Relief Act is not the basis for claiming relief and hence the said findings given in the earlier suit are wholly irrelevant for determining the jurisdictional issue.

51. Admittedly, the Apex Court has stayed the execution of the decree passed in the suit filed by the defendant under section 6(1) of the Specific Relief Act till the disposal of the present suit filed by the plaintiff. Therefore, it is not open to the defendant to contend that without first restoring the possession the plaintiff is trying to extinguish, through the Court of law, the mediate possession of the defendant and thereby seek legal possession. In view of our finding that on the basis of the averments made in the plaint the suit filed by the plaintiff is maintainable in this Court, we do not think it necessary to refer to various other Judgments cited by the learned counsel for the defendant.

52. For all the aforesaid reasons, we do not find any legal infirmity in the order passed by the learned Single Judge in holding that the suit filed by the plaintiff is maintainable in this Court.

53. Accordingly, the appeal fails and the same

is dismissed, however, with no order as to costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)